IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 30

MONTGOMERY WARD & COMPANY ..... *Petitioner,*

v.

LUTHER M. DUNCAN ..... *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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I

OPINIONS OF COURTS BELOW

The opinion of the U. S. District Court for the Eastern District of Arkansas, Western Division (R. 101-106), is reported in 27 Fed. Supp., at page 4. The opinion of the Circuit Court of Appeals (R. 128-135) is reported in 108 Fed. Rep. (2d) (advance sheets No. 5), at page 848.

II

Jurisdiction

(1) The date of the judgment and order to be reviewed is January 23, 1940 (R. 135, 136). A petition for rehearing was filed with the Circuit Court of Appeals, was entertained by that Court and was denied by it on February 12, 1940 (R. 147). Certiorari was granted by this Court April 8, 1940 (R. 151).

(2) The statutory provision which is believed to sustain the jurisdiction of this Court is Judicial Code, Section 240, and Amendments, including the Act of February 13, 1925, Chapter 229, Section 1; 43 Stat., 938; U. S. C., Title 28, Section 347.

(3) The nature of the case will be stated under the heading "Statement of the Case" immediately following. As stated, the case resulted in a final judgment and decree in the Circuit Court of Appeals, which appears in the record at pages 135, 136.

(4) Since this Court, under the statutory provisions referred to above, has jurisdiction to review on certiorari the judgment of a Circuit Court of Appeals in any case, we regard it unnecessary at this point to cite cases believed to sustain the jurisdiction. However, in this connection, we refer to the cases that will be hereafter cited and discussed in the argument.

III

STATEMENT OF THE CASE

On August 31, 1938, the respondent, Luther M. Duncan, instituted this suit in the Circuit Court of Pulaski County, Arkansas, against the petitioner, (original Complaint, R. 1), alleging that on July 3, 1938, he was in the employ of the petitioner as a truck driver and that one Jake Jackson was at the time an employee of the petitioner and working as a helper on the truck operated by the respondent. That the respondent and Jake Jackson were instructed by the petitioner to deliver an ice box to a customer at Greenbrier, Arkansas. That while respondent and the said Jake Jackson were in the act of unloading the ice box the respondent received the injuries complained of and more specifically hereinafter enumerated in referring to respondent's amendment to his complaint. That as a result of the injuries sustained by him he was totally incapacitated from performing any sort of work from the date of such injuries and has suffered excruciating physical pain and mental anguish. There was a prayer for recovery of $45,000, with costs.

On September 16, 1938, this cause was removed to the United States District Court for the Eastern District of Arkansas, Western Division, and on October 6, 1938, petitioner filed its answer (R. 3), specifically denying the foregoing allegations of respondent's complaint and further pleaded that the respondent and Jake Jackson, at the times mentioned in respondent's complaint, were in the employ of one E. L. Santee, who, during the times mentioned in respondent's complaint, was under contract with the petitioner to make deliveries of merchandise sold by the petitioner to its customers in the Little Rock territory.

On February 10, 1939, respondent filed an amendment to his complaint (R. 5), in which he described the injuries sustained by him in greater detail, and in addition alleged that the negligence of the petitioner consisted in the following state of facts: That the ice box described in the complaint had been transported in and was being unloaded from a covered truck or van, the end gate of which could be lowered to a horizontal position on a level with the floor of the bed of the truck; that the floor of the truck bed and the end gate, when lowered, were slightly higher than the porch floor to which said box was being lowered by respondent and his co-worker (Jake Jackson); that because of the excessive weight of the box and because of the position in which respondent was placed in stepping down, backwards, from the truck to the porch floor, caution on the part of his co-worker was necessary and was usual and customary and had been exercised on previous like occasions and was reasonably expected by respondent on this occasion, to prevent injury to respondent by throwing an excessive load or weight upon him; that about the time respondent stepped backwards from the truck floor to the porch, bearing the weight of one side of said box, his co-worker, having cleared the top or cover of said truck bed, unexpectedly, carelessly and negligently straightened up and raised his side of the box, at a time when he should have kept the same lowered and on a level with that of respondent, and thus threw practically the entire weight of the box on the respondent at a time when respondent was in a hazardous position and unable to stand such weight or strain; that it was as a result of such negligence on the part of his co-worker that the respondent received the injuries complained of. (R. 6, 7.)

On February 16, 1939, the petitioner filed an answer (R. 7), to the foregoing amendment to complaint in which

it pleaded, first, that the respondent and the respondent's co-worker, Jake Jackson, were in fact employees of E. L. Santee, an independent contractor, and not employees of the petitioner; second, that if the respondent received the injuries complained of, such injuries were caused or contributed to by his own negligence; and, third, assumption of risk on the part of the respondent.

The trial was begun before a jury on February 16, 1939; a verdict was rendered by the jury on behalf of the respondent on February 18, 1939, in the sum of $16,500; and on the same date the court entered judgment on said verdict against the petitioner in the sum of $16,500, with costs (R. 96).

No person, other than the respondent and his co-worker, Jake Jackson, witnessed the accident. The testimony of the respondent and Jake Jackson was in sharp conflict, so that respondent's own testimony with reference to the circumstances of the accident embraces all of the testimony upon which this element of his case rests. Respondent's testimony with reference to the circumstances of the accident was as follows:

That on the morning of the 27th of June, 1938, respondent and his co-worker, Jake Jackson, were directed by Mr. Smothers, shipping clerk at petitioner's Little Rock, Arkansas, store to deliver an ice box to the store of J. O. Cantrell, a merchant at Greenbrier, Arkansas. That the truck was driven by the respondent and Jake Jackson was his helper. That the truck used by them had a van body on it and an end gate at the back of it which could be let down level with the floor of the truck bed (R. 35). That when they reached the Cantrell store they backed the truck up to the rear of the store against the unloading platform,

with the end gate of the truck overlapping the platform. That the end gate and floor of the truck were ten or twelve inches higher than the porch or unloading platform (R. 35). That after backing the truck up against the porch or unloading platform, respondent and Jackson went into the van or truck and got the ice box and when they reached down to lift it respondent said "all right." That they would always give signals because the box was between them (R. 35). That they edged the box back to the end gate and respondent hollered "Hold it, Jake, take it easy; I am stepping down"; and as respondent stepped down Jake Jackson raised his side of the box a little bit and threw a little weight on the respondent, and the respondent went down as he was stepping down. That Jake Jackson tilted the box over toward him; that the box did not fall on the respondent; that the respondent hollered, "Set it down, Jake." That he, respondent, was going down and hollered to him (Jackson) to let the box down. That respondent told Jackson that he had hurt his back and couldn't do any more (R. 36). That there was no one else out there at the time. That there wasn't much said about the accident except that respondent told Jackson that he hurt his back. That respondent didn't know at the time that he was as seriously hurt as he was. That some other people helped Jackson put the box in the store. That respondent drove the truck back to town. That his back was still hurting him when he got back to town (R. 36). That he tried to work the next day but was suffering so from his back that he had to give it up and go home, and that the next day he went to the hospital (R. 37).

At the conclusion of respondent's case the petitioner moved the court for a directed verdict (R. 58), on the following grounds:

"First: The evidence introduced by plaintiff is insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.

"Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson, that both were the employees of E. L. Santee, and E. L. Santee was an independent contractor under the contract in force between E. L. Santee and Montgomery Ward and Company, providing for E. L. Santee furnishing a driver and helper to make all deliveries for Montgomery Ward and Company."

The trial court overruled petitioner's motion for a directed verdict; whereupon, petitioner offered evidence in its own behalf, at the close of which it renewed its motion for a directed verdict (R. 88), on the following grounds:

"First: The evidence introduced by plaintiff is insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"Second: The evidence considered in its most favorable light on behalf of the plaintiff is insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"Third: The evidence shows as a matter of law that the injury sustained by plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which was open and obvious and known to and appreciated by him, and assumed by him as a part of his employment.

"Fourth: The evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee and further shows that E. L. Santee was an independent contractor insofar as the plaintiff and his relations to the defendant was concerned.

"Fifth: That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured, that he was injured by any negligent act or acts on the part of Jake Jackson.

"Sixth: That the evidence shows that the plaintiff was himself guilty of negligence in the manner in which he attempted to unload the ice box from the truck to the loading platform, and that if there was any negligence on the part of the helper, Jake Jackson, that the plaintiff was guilty of such contributory negligence in the case, as in the event of recovery would diminish his recovery in proportion to what his contributory negligence contributed to his injury."

The renewed motion was likewise overruled, and the cause was submitted to the jury under instructions of the court, with the result that, as above stated, on February 18, 1939, the jury returned a verdict on behalf of the respondent against the petitioner, and fixed his damages in the sum of $16,500. The court entered judgment on the verdict on the same date (R. 96).

On February 25, 1939, petitioner filed its motion for a judgment *non obstante veredicto* and joined with this

motion a motion for a new trial in the alternative, as provided for by Rule 50 (b) of the Federal Rules of Civil Procedure, which became effective September 13, 1938, which motion was as follows (R. 97):

"Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:

"A. Grounds for Motion to set aside verdict of the jury and the judgment rendered and entered thereon and to enter judgment for the defendant notwithstanding the verdict:

"1. That the verdict is contrary to the law.

"2. That the verdict is contrary to the evidence.

"3. That the verdict is contrary to the law and evidence.

"4. That the evidence introduced by the plaintiff was insufficient to make a *prima facie* case and fails to establish the relation of employer and employee as between the defendant and Jake Jackson.

"5. That the evidence considered in its most favorable light on behalf of the plaintiff was insufficient to support any verdict that might be rendered the plaintiff against the defendant.

"6. That the evidence shows as a matter of law that the injury sustained by the plaintiff, if any, on June 27, 1938, was the result of one of the ordinary risks and hazards of his employment which were open and obvious and known to and appreciated by him and assumed by him as a part of his employment.

"7. That the evidence shows that the plaintiff was a fellow servant of Jake Jackson; that both were the employees of E. L. Santee; and further shows that E. L. Santee was an independent contractor insofar as the plaintiff and his relations to the defendant were concerned.

"8. That the defendant has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act or acts on the part of Jake Jackson.

"9. The Court erred in refusing to grant defendant's request for a directed verdict.

"B. Grounds for motion for a new trial:

"(NOTE: Here follow specifications numbered '1' to '8,' inclusive, which are identical with specifications numbered '1' to '8' under Section 'A,' above, which, for the sake of brevity, are not here repeated.)

"9. That the damages found by the jury and the verdict based thereon were excessive.

"10. That it was error for the court to permit Dr. Mahlon D. Ogden, a witness for the plaintiff, to answer a certain hypothetical question propounded by plaintiff's counsel, as amended by plaintiff's counsel, after objection by defendant's counsel, over the objections of the defendant, which hypothetical question, defendant's objection thereto, plaintiff's amendment of such question, the court's ruling thereon, and the answer of the witness to said question are as follows:

"(NOTE: Here follows the hypothetical question propounded to the witness by Mr. Coulter, the objection of Mr. Chowning, the ruling of the court, the amendment by Mr. Coulter, and the answer of the witness, as the same appear at pages 56 to 58 of the record, all of which, for the sake of brevity, is not here repeated.)

"11. The court erred in refusing to grant defendant's request for a directed verdict.

"WHEREFORE, the defendant prays that the verdict of the jury herein, and the judgment rendered and entered thereon, be set aside, and a judgment rendered and entered herein in favor of the defendant; and defendant further prays in the alternative that in the event the court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the court set aside said verdict and judgment on behalf of the plaintiff and grant the defendant a new trial herein."

On February 27, 1939, petitioner filed an amendment to the foregoing motion, which amendment was as follows (R. 100):

"Comes the defendant, Montgomery Ward & Company, and amends its motion heretofore filed herein entitled 'Motion to Set Aside Verdict of Jury and the Judgment Rendered and Entered Thereon and to Enter Judgment for the Defendant Notwithstanding the Verdict, and Motion for a New Trial,' in the following particulars:

"That sub-paragraphs numbered 8 of paragraph A. and B., respectively, of said motion are hereby amended so that each of said sub-paragraphs shall read as follows:

" '8. That the plaintiff has failed to prove by a preponderance of the evidence that he was injured in the manner alleged in his complaint, and that if injured that he was injured by any negligent act on the part of Jake Jackson.'

"That in addition to the grounds stated in said motion as a basis for a new trial herein, the defendant adds the following additional errors as grounds for a new trial, and does hereby amend paragraph B. of the aforesaid motion by adding thereto sub-paragraphs 12, 13 and 14, as follows:

"12. The court erred in refusing defendant's requested instruction No. 4.

"13. The court erred in refusing defendant's requested instruction No. 9.

"14. The court erred in modifying defendant's requested instruction No. 9, and in giving said instruction No. 9 as modified, over the objection of the defendant.

"WHEREFORE, (Here follows a prayer identical with the prayer of the foregoing original motion, which prayer, for the sake of brevity, is not here repeated)."

On March 29, 1939, the trial court filed a written opinion, (R. 101-106) reciting that the verdict of the jury and judgment thereon should be set aside and petitioner's motion for judgment notwithstanding the verdict granted, and on April 17, 1939, the court entered an order setting aside the verdict of the jury and the judgment entered thereon and entering a judgment for the petitioner (R. 107).

The following excerpts from the opinion of the trial court sufficiently show the trial court's reasons for granting petitioner's motion for a judgment *non obstante veredicto*, namely:

"Giving the testimony its most probative effect and force, I do not think it is sufficient to sustain a verdict for the plaintiff in this case." (R. 105).

"* * * there is no evidence to show that the raising of this box, if any, was due to negligence on the part of Jake Jackson" (R. 105).

On April 21, 1939, respondent filed a motion requesting the trial court to pass on petitioner's motion for a new trial "to the end that only one appeal might be necessary" (R. 108); and on the same date, that is, April 21, 1939, the trial court entered an order overruling said motion (R. 111).

Thereafter the respondent perfected his appeal to the United States Circuit Court of Appeals for the Eighth Circuit, specifying the following alleged errors as grounds for appeal (R. 113):

"1. The trial court erred in granting the motion of defendant for a judgment notwithstanding the verdict, and in setting aside the verdict of the jury and the judgment rendered and entered pursuant thereto, and in rendering and causing to be entered a judgment in favor of defendant notwithstanding the verdict, on the erroneous grounds and hypotheses that the motions therefor were sufficient, that he had the power, after the expiration of ten days, to grant such relief on a ground not asserted in the motions for a directed verdict, that the evidence was not sufficient to support the verdict, that there was no actionable negligence on the part of plaintiff's fellow servant, and that plaintiff assumed the risk of the danger as a result of which he was injured.

"2. The trial court erred in finding and concluding that plaintiff assumed the risk of the danger as a result of which he was injured.

"3. The trial court erred in finding and concluding that the evidence failed to show any actionable

negligence on the part of plaintiff's fellow servant, Jake Jackson.

"4. The trial court erred in finding and concluding that the evidence was insufficient to support the verdict of the jury and the judgment entered thereon.

"5. The trial court erred in depriving plaintiff of his constitutional right to a trial of the issues of fact in this cause by a jury.

"6. The trial court abused his discretion and erred in denying the motion of plaintiff and in refusing to specify the grounds on which he granted to defendant the relief sought.

"7. The trial court erred in overruling the motion of plaintiff for an order passing on defendant's motion for a new trial.

"8. The trial court erred in overruling the motion of plaintiff to strike paragraphs numbered '1,' '2,' and '3' of defendant's amendment to its answer, and in permitting defendant, on the day of the trial, to interpose an amendment raising new issues and defenses."

On January 23, 1940, the United States Circuit Court of Appeals for the Eighth Circuit entered an order and judgment reversing the order and judgment appealed from and directed the trial court to reinstate the verdict of the jury and the judgment entered thereon (R. 135). The reasons assigned by the Circuit Court of Appeals for the reversal of the case and for its direction to the trial court to reinstate the verdict and the judgment entered thereon are indicated by the following quotations from the court's opinion:

(1) "There was substantial evidence to warrant the jury in finding that the injury was the direct result of the

sudden and unexpected 'tilting' of the ice box in disobedience to the signal given by plaintiff" (R. 133). In other words, that there was substantial evidence to sustain the verdict of the jury.

(2) That strictly speaking, petitioner's motion filed in accordance with Rule 50(b) of the Federal Rules of Civil Procedure, "did not pray for relief in the 'alternative,' giving the court a choice between two propositions either of which he might grant in the first instance. The court was asked to rule on the motion for a new trial only 'in the event' he 'refuses to set aside the verdict * * * and judgment * * * and refuses to enter judgment herein in favor of the defendant * * *'" (R. 135).

(3) That "the order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial, and the latter motion passed out of the case upon the entry of the order" (R. 135).

A petition for rehearing was duly filed by petitioner with the Circuit Court of Appeals, was entertained and was denied by an order entered on the 12th day of February, 1940 (R. 147).

IV

Specification of Errors

The Circuit Court of Appeals erred in holding that the order of the District Court sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial and that the latter motion passed out of the case upon the entry of the order. In so holding, the Circuit Court of Appeals placed an erroneous interpretation upon Rule 50(b) of the Rules of Civil Procedure.

The Circuit Court of Appeals erred in remanding the case to the District Court with direction to reinstate the verdict of the jury and the judgment entered thereon. The case should have been remanded to the District Court with direction to pass upon the motion for a new trial.

Summary of Argument

(1) Petitioner's motion did, in accordance with Rule 50(b), pray for a new trial in the alternative.

(2) The order of the District Court sustaining petitioner's motion to set aside the verdict and judgment entered thereon and to enter judgment in accordance with its previous motion for a directed verdict was not equivalent to a denial of petitioner's motion for new trial; and the latter motion did not pass out of the case upon the entry of the order. Upon reversal by the Circuit Court of Appeals of the order setting aside the verdict of the jury and the judgment thereon and entering judgment for petitioner, the motion for new trial remained in the case to be acted upon, and the Circuit Court of Appeals should have remanded the case with direction to the District Court to pass upon the motion for new trial.

Bean v. *Coffee*, 169 Ark. 1052 (277 S. W. 522).

Lyon v. *Mutual Benefit Assn.*, 305 U. S. 484.

Aetna Cas. & Surety Co. v. *Reliable Auto & Tire Co.*, 58 Fed. (2d) 100.

R. R. Co. v. *Reeder*, 211 Fed. Rep. 280.

U. S. v. *Flippence*, 72 Fed. Rep. (2d) 611.

Pruitt v. *Hardware Dealers Mutual Fire Ins. Co.*, 112 Fed. Rep. (2d) (advance sheets, No. 1, p. 140).

Pessagno v. *Euclid Inv. Co., Inc.*, 112 Fed. Rep. (2d) (advance sheets, No. 4, p. 577).

Simpkins' Federal Practice, 3rd. Ed., Sec. 702.

ARGUMENT

This case involves an interpretation placed by the Circuit Court of Appeals for the Eighth Circuit upon Rule 50(b) of the Rules of Civil Procedure. The Circuit Court of Appeals has so interpreted the rule as to hold that where a motion for a new trial is prayed alternatively with a motion to set aside the verdict of the jury and the judgment entered thereon and to enter judgment in accordance with a previous motion for a directed verdict, the granting by the District Court of the latter motion is equivalent to a denial of the motion for a new trial, which thereupon passes out of the case; and that upon a reversal of the order setting aside the verdict and judgment thereon and entering judgment notwithstanding the verdict, the case must be remanded to the District Court with instruction to reinstate the verdict and the judgment thereon; thus depriving the party who has filed it of the opportunity to have his motion for new trial passed upon.

Rule 50(b), after providing that a party who has theretofore moved for a directed verdict may, after the reception of the verdict of a jury, move to have the verdict and judgment entered thereon set aside and judgment entered in accordance with his previous motion for a directed verdict, provides further that a motion for new trial may be joined therewith or a new trial may be prayed for in the alternative. The new trial here referred to is obviously that provided for in Rule 59 of the Rules of Civil Procedure, which provides that a new trial may be granted in any action in which there has been a trial by a jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Federal Court.

It has generally been supposed, in the light of the announced purpose of the new rules to simplify procedure, that the purpose of Rule 50(b) is to permit a new trial to be prayed for alternatively, thereby making it unnecessary to file the motion provided for in Rule 59 separately; and it has not been thought that it was intended to impose the risk upon a party of forfeiting his right to have his prayer for a new trial passed upon in the event the motion to set aside the verdict and judgment thereon and to enter judgment for the movant is sustained by the District Court and the order is thereafter reversed by the Appellate Court. Such a result seems hardly within the spirit of the rules, and the holding to that effect of the Circuit Court of Appeals in this case has since the granting of certiorari by this Court been rejected by the Circuit Court of Appeals of the Fifth Circuit in the case of *Pruitt* v. *Hardware Dealers Mutual Fire Insurance Co.*, 112 Fed. Rep. (2d) (advance sheets, No. 1), page 140, and by the Court of Appeals for the District of Columbia in the case of *Pessagno* v. *Euclid Investment Co., Inc.*, 112 Fed. Rep. (2d) (advance sheets, No. 4), page 577. We shall later refer to both of these cases.

(1) Petitioner's Motion Did, In Accordance With Rule 50(b), Pray For A New Trial In The Alternative.

The motion filed by petitioner in the District Court for judgment notwithstanding the verdict and in the alternative for a new trial appears in the Record at pages 97-100. The motions were joined in the one pleading, and in the prayer (R. 99), it was asked "In the event the Court refuses to set aside the verdict rendered for the plaintiff and the judgment in favor of the plaintiff rendered and entered on said verdict, and refuses to render and enter judgment herein in favor of the defendant notwithstanding said verdict and judgment, that the Court set aside said verdict and judgment on behalf of the plaintiff and grant

the defendant a new trial herein." In the body of the motion the grounds upon which the Court was asked to set aside the verdict and judgment thereon and enter judgment notwithstanding and the grounds upon which a new trial was prayed were set out separately and distinctly.

While we do not understand the Circuit Court of Appeals to hold judicially that the motion did not pray for a new trial in the alternative, and while it is clear that the action of the Court in remanding the case with instruction to reinstate the verdict and judgment in favor of respondent was not based upon such a holding, yet the Court does in its opinion remark (R. 135): "Strictly speaking the motion did not pray for relief in the 'alternative,' giving the Court a choice between two propositions either of which he might grant in the first instance. The Court was asked to rule on the motion for new trial 'in the event' he 'refuses to set aside the verdict . . . and judgment . . . and refuses to enter judgment herein in favor of the defendant.'"

We cannot agree with the above statement. The rule permits a motion for a new trial in the alternative, and the fact that a new trial was prayed in the event the Court should refuse to set aside the verdict and judgment and to enter judgment in favor of the movant in no way keeps the prayer from being in the alternative. The word "alternative" is defined in Webster's New International Dictionary as "offering a choice of two . . . things; offering for choice a second thing or proposition." Since the prayer did not request the Court to grant both motions the Court was given its choice. If it should decline to grant the motion to set aside the verdict and judgment thereon and to enter judgment in favor of petitioner, the Court was offered as a second proposition the oppertunity of granting a motion for a new trial.

According to customary procedure the District Court would ordinarily pass on the prayer that it set aside the verdict and judgment thereon and render judgment in favor of the movant before it would reach or entertain the prayer for a new trial. If the former were granted, there would be no reason to grant or entertain the latter. Petitioner's prayer, therefore, in asking the Court to grant a new trial in the event it should refuse to set aside the verdict and judgment and enter judgment in favor of petitioner, merely followed the usual course of procedure, and surely cannot be said for that reason not to have asked for relief in the alternative. Any other view obviously seeks to apply Rule 50(b) in the very spirit of over-refinement which it is the avowed purpose of the new rules to abolish.

(2) The Order of the District Court Sustaining Petitioner's Motion to Set Aside the Verdict and Judgment Entered Thereon and to Enter Judgment in Accordance with Its Previous Motion for a Directed Verdict was not Equivalent to a Denial of Petitioner's Motion for New Trial; and the Latter Motion Did Not Pass Out of the Case Upon the Entry of the Order. Upon Reversal by the Circuit Court of Appeals of the Order Setting Aside the Verdict of the Jury and the Judgment Thereon and Entering Judgment for Petitioner, the Motion for New Trial Remained in the Case to Be Acted Upon, and the Circuit Court of Appeals Should Have Remanded the Case with Direction to the District Court to Pass Upon the Motion for New Trial.

Coming now to the ruling of the Circuit Court of Appeals that the order sustaining the motion to set aside the verdict and judgment thereon and for a judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial and that the latter motion passed out of the case upon the entry of the order, we respectfully urge that it is at utter variance with Rule 50(b). Prior to the ruling

of the Circuit Court of Appeals it had not been understood that the rule, in giving the privilege of joining in the alternative, intended to eliminate from the case the motion for a new trial in the event the motion for judgment notwithstanding the verdict is granted by the trial Court and its order is later reversed by the Appellate Court.

It is all the more apparent that an order sustaining a motion to set aside the verdict and judgment thereon and for judgment notwithstanding the verdict cannot be equivalent to a denial of a motion in the alternative for a new trial when it is remembered that the trial Court in passing upon a motion for a new trial is governed by wholly different considerations than those which apply when the Court is considering a motion for judgment notwithstanding the verdict. In the latter case the question before the Court is the same as when it is asked in the first instance to direct a verdict. If there is any substantial evidence in support of the issues tendered by the plaintiff, the case must be submitted to the jury, as held by the Circuit Court of Appeals in this case; and in the event of a verdict the trial Court has no power to set it and the judgment entered thereon aside and enter judgment in favor of the other party. The question is not one of preponderance of the evidence, but only whether there is substantial evidence to support the verdict.

But in passing upon a motion for a new trial the trial Court is not bound to sustain the verdict merely because there may be substantial evidence to support it. On the contrary, it is the duty of the trial Court under Arkansas practice to set the verdict aside and grant a new trial if in its opinion the verdict is against a preponderance of the evidence. The rule has been settled in Arkansas by repeated decisions, the Supreme Court of Arkansas saying,

in the case of *Bean* v. *Coffee*, 169 Ark. 1052 (277 S. W. 522), at page 1054:

> "The duty of the trial court, when it is believed and found that the verdict returned is contrary to the preponderance of the evidence, was thoroughly considered by us in the case of *Twist* v. *Mullinix*, 126 Ark. 427, and we need not repeat here what we there said. A syllabus in that case reads as follows: 'Where the trial court finds positively and unequivocally that the verdict of the jury is against the preponderance of the evidence, it is reversible error for him thereafter to fail to set aside the verdict.' See also *Spadra Creek Coal Co.* v. *Callahan*, 129 Ark. 448; *Spadra Creek Coal Co.* v. *Harger*, 130 Ark. 374; *Mueller* v. *Coffman*, 132 Ark. 45; *Wilhelm* v. *Collison*, 133 Ark. 166. *Pettit* v. *Anderson*, 147 Ark. 468."

Presumably the Federal Courts will in accordance with the Conformity Act upon such questions follow the State Court (*Lyon* v. *Mutual Benefit Assn.*, 305 U. S. 484-490), but, to say the least, the Federal District Court has full power and discretion to set aside the verdict of a jury and grant a new trial whenever in its opinion the preponderance of the evidence does not support the verdict.

Aetna Cas. & Surety Co. v. *Reliable Auto & Tire Co.*, 58 Fed. (2d) 100.

R. R. Co. v. *Reeder*, 211 Fed. 280.

U. S. v. *Flippence*, 72 Fed. (2d) 611.

"According to all the Federal cases he (the District Judge) has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal." (Parenthesis ours.) *Pruitt* v. *Hardware Dealers Mut. Fire*

Ins. Co., 112 Fed. (2d) Rep. (advance sheets, No. 1), pp. 140, 143.

In the above connection, it must be remembered that the Circuit Court of Appeals did not find that the preponderance of the evidence sustained the issues tendered by respondent. On the contrary, the Court followed the rule applicable in the case of a motion for a directed verdict, saying: "On a motion for a directed verdict the evidence must be considered in its most favorable light on behalf of the plaintiff, and if there is substantial evidence in support of the issues tendered by the plaintiff they must be submitted to the jury" (R. 132); and the Court found merely that "there was substantial evidence to warrant the jury in finding that the injury was the direct result of the sudden and unexpected 'tilting' of the ice box in disobedience to the signal given by plaintiff" (R. 133). The Court expressed no opinion as to where the preponderance of the evidence lay.

But the trial Court was of the opinion and found "positively and unequivocally" that on the issue of negligence the preponderance of the evidence was in favor of petitioner and against respondent, the trial Court saying in its opinion:

> "Giving the testimony its most probative effect and force, I do not think it is sufficient to sustain a verdict for the plaintiff in this case" (R. 105).
>
> ". . . There is no evidence to show that the raising of this box, if any, was due to negligence on the part of Jake Jackson". (R. 105).

Having found that the verdict was against the preponderance of the evidence, and petitioner having so alleged

as one of the assignments in its motion for a new trial (R. 97-99), it would be the duty of the trial Court under the Arkansas practice, and certainly within its power and discretion under the Federal decisions, to set aside the verdict and judgment and grant a new trial when called to pass upon the motion for a new trial. Under such circumstances, petitioner would have been entitled, in the event the trial Court had refused to grant the motion for a judgment notwithstanding the verdict, to have the Court pass upon the motion for a new trial. The trial Court, however, took the view that, having granted the motion for judgment notwithstanding the verdict, it was unnecessary for it to pass upon the motion for a new trial. We cannot understand by what process of reasoning it can be said that Rule 50(b) under such circumstances is intended to penalize petitioner by forfeiting its opportunity to have the trial Court pass upon its motion for a new trial now that the Appellate Court has reversed the order sustaining the motion for a judgment notwithstanding the verdict.

The statement of the Circuit Court of Appeals that "the order sustaining the motion for a judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial" cannot be true, for the reason that the consideration of the motion for a new trial, had it become necessary for the trial Court to entertain it, would have involved, as pointed out, wholly different questions as to the *quantum* and sufficiency of the evidence from those that were presented by the motion for a judgment notwithstanding the verdict. A motion for a new trial should be granted if in the trial Court's opinion the verdict is against the preponderance of the evidence; whereas, upon motion for judgment notwithstanding the verdict, the only question presented to the Court is whether there is any substantial evidence to support the verdict. Moreover, the motion for

a new trial as abstracted on pages 97, 98 and 99 of the record contains assignments of error that were not included in the motion for judgment notwithstanding the verdict; error being assigned, for example, to the action of the trial Court in permitting the introduction of certain evidence over the objection of petitioner's counsel.

The motion for a new trial was not acted upon because of the action of the trial Court in sustaining the motion for judgment notwithstanding the verdict, but it does not follow that it passed out of the case. If the trial Court had denied the motion for judgment notwithstanding the verdict, the motion for new trial would most assuredly have remained for disposition. Now that the action of the trial Court in granting the motion for judgment notwithstanding the verdict has been reversed, why does not the motion for new trial still remain for disposition? We quote the statement of Mr. Simpkins appearing in his latest work on Federal Practice, 3rd Edition, page 514, Section 702, where in discussing under Rule 50(b) the question here presented, he says:

> "If the motion for judgment *non obstante veredicto* is granted, what happens to the motion for a new trial? If left undisposed of, by the trial court, the appellate court, if it reverses the judgment *non obstante veredicto*, can only remand with directions to pass on the motion for a new trial. It would seem permissible for a trial judge, while the evidence and witnesses are fresh in his memory, to rule on the motion for new trial in the alternative, such ruling not to become effective unless and until the order granting the judgment notwithstanding the verdict shall thereafter be vacated or reversed in the manner provided by law."

As stated in the beginning of the Argument, since the granting by this Court of certiorari in this case, the Circuit

Court of Appeals for the Fifth Circuit in the case of *Pruitt, et al,* v. *Hardware Mutual Dealers Fire Ins. Co.,* 112 Fed. Rep., (2d) (advance sheets, No. 1), p. 140, and the Court of Appeals for the District of Columbia in the case of *Pessagno* v. *Euclid Investment Co., Inc.,* 112 Fed. Rep. (2d) (advance sheets, No. 4), p. 577, have passed upon the question here presented, and have rejected and refused to follow the conclusion of the Circuit Court of Appeals of the Eighth Circuit.

In *Pruitt* v. *Hardware Dealers Mutual Fire Ins. Co., supra,* the defendant duly moved for an instructed verdict. Decision upon the motion was withheld and the case was submitted to the jury, which returned a verdict for the plaintiff. Thereafter, within ten days, a motion was filed by the defendant for judgment notwithstanding the verdict and in the alternative for a new trial. The District Court granted the motion for judgment notwithstanding the verdict and entered judgment for the defendant. The Circuit Court of Appeals for the Fifth Circuit held that there was sufficient evidence to make a jury question upon the issues tendered by the plaintiff, and reversed the judgment of the District Court. Appellant thereupon contended that the Court of Appeals should remand with instruction to the District Court to enter a judgment upon the verdict as was done in the case at bar. But the contention was denied, the Court saying (p. 143):

> "It follows that the judgment for the defendant notwithstanding the verdict ought not to have been entered and must be reversed. Appellants thereupon contend that we should order a judgment entered on the verdict, as was done in *Duncan* v. *Montgomery Ward & Co.,* 8 Cir., 108 F. (2d) 848, 853. That, we think, would be a misapplication of Rule of Civil Procedure, 50(b). . . An alternative motion for new trial

was made in this case. If the judge had refused the judgment on directed verdict for defendant primarily asked, as we have held he should have done, he should then have considered the motion for new trial. According to all the federal cases he has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. In this case a new trial might be granted either because the judge thought the jury went wrong in not finding that the fall of the building preceded the fire in the merchandise, or because he thought the amount of the fire loss found was not justified. When we reverse the grant of judgment as on a directed verdict, the cause should be remitted to the district judge that he may pass on the motion for new trial. . . . Rule 50 ought not to be so construed as to cut off his supervisory power over the verdict because he erred in giving judgment notwithstanding the verdict. To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. Rule 59(d).

"The judgment in favor of the appellee is reversed, and the cause remanded with direction to the district judge to pass upon the motion for a new trial."

In *Pessagno* v. *Euclid Investment Co., supra,* at the close of all the evidence appellee moved for a directed verdict, but decision on the motion was reserved and the jury returned a verdict for appellant. Thereafter, appellee moved to set aside the verdict and enter judgment in its favor in accordance with the previous motion for a directed verdict, and in the alternative for a new trial. The District

Court set aside the verdict and entered judgment notwithstanding for appellee in accordance with Rule 50(b). The Court of Appeals for the District, holding that there was sufficient evidence to compel submission of the case to the jury, reversed the action of the District Court in setting aside the verdict and entering judgment notwithstanding. The question then arose whether the case should be remanded with instruction to reinstate the verdict and the judgment entered thereon or with instruction to pass upon the motion for a new trial. In discussing the question it was said by the Court of Appeals, (pp. 579-580):

> "We have, then, a case where the trial judge reserved his ruling on a motion for a directed verdict, then erroneously set aside the verdict, entered judgment for the defendant, and did not pass on the motion for new trial. Rule 50(b) provides: . . .
>
> "What now to do with the case under the circumstances we have outlined, is a novel question. . .
>
> "What, then, happens to the motion for a new trial? The Eighth Circuit in the Duncan case held that granting the motion for a directed verdict was tantamount to denying a new trial and that ended the question. But the motion was peculiarly worded, and in view of the pending certiorari, this aspect of the decision may have been wrong. There are a number of state decisions involving alternative motions for new trial. Most of them hold that the case should be remanded with instructions to the trial court to reinstate the verdict and then pass upon the motion for new trial. This procedure is recommended to federal courts by the only writer who has expressed himself on the point. Simpkins Federal Practice, 1938, Sec. 702. . . A motion for directed verdict raises only the question whether reasonable men might differ on the question of negligence. *Tobin* v. *Pennsylvania R.*, 69 App. D. C. 262, 100 F. (2d) 435. A motion for a new trial, how-

ever, may raise a myriad of other questions as to which appellant has the right to a ruling. Cf. *Thompson* v. *Rutledge*, 32 Ohio App. 537, 168 N. E. 547.

> "Our order, therefore, will be that the judgment entered by the lower court be reversed and the case remanded to that court with instructions to reinstate the verdict and pass upon the alternative motion for a new trial."

In the opinion of the Court of Appeals of the Eighth Circuit it is said: "The new rules are not intended to prolong litigation by permitting litigants to try cases piecemeal. Their purpose would not be accomplished if when relief is asked on condition or in the alternative the successful party could on reversal go back to the trial Court and demand a ruling on his conditional or alternative purpose" (R. 135). The quoted language is tantamount to an outright ruling that a litigant can avail himself of the right given under Rule 50(b) to join with his motion for judgment notwithstanding the verdict an alternative motion for new trial only upon condition of forfeiting his right to have his motion for new trial passed upon in case the trial Court erroneously grants the motion for judgment notwithstanding the verdict. The ruling finds no support in the purpose for which the Rules of Civil Procedure were adopted.

It is true that the new rules are not intended to prolong litigation, but neither are they intended to so tie the hands of the trial judge as to divest him of his supervisory power over a verdict merely because he may have erred in giving judgment notwithstanding the verdict; nor are they intended to take away from the litigant the protection of the trial judge's supervisory power over the verdict because he may have erred in giving judgment notwithstand-

ing. Their purpose is not furthered by compelling the litigant to speculate as to whether the trial judge may take the correct course in the event a motion for a new trial is alternatively joined with a motion for judgment notwithstanding the verdict. There are instances in the new rules where various types of cases are expressly permitted to be tried piecemeal as to various issues; and there is no provision contained in the rules that requires any case, especially wherein justice may result, to be tried and disposed of by the trial judge at one sitting.

The trial Court took the view that a ruling upon the motion for a new trial, after the motion for judgment notwithstanding the verdict had been granted, would have been premature and useless. Under those circumstances, to so construe Rule 50(b) as to hold that the trial judge had lost his supervisory power over the verdict, and that the petitioner has lost the right to present the assignments preserved in its motion for new trial, simply because the trial judge erred in granting the motion for judgment notwithstanding the verdict is, we respectfully urge, to put technical considerations above justice. Such an interpretation of Rule 50(b) is at variance with the spirit of the rules, and instead of tending to simplify procedure and to protect litigants from its technicalities will have precisely the reverse effect. As stated by the Court of Appeals for the Fifth Circuit in *Pruitt* v. *Hardware Dealers Mutual Ins. Co.*, *supra*, Rule 50(b) should not be construed as to so cut off the supervisory power of the District Judge over the verdict. "New trials are not abridged or disfavored by the new rules."

For the reasons above set forth we submit that the order and judgment of the Circuit Court of Appeals of the

Eighth Circuit should be reversed, and that the case should be remanded to the District Court with direction to pass upon the motion for a new trial.

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